Reignmont Estate Sdn Bhd v Jaya Ikatan Plantations Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22 NCVC-289 OF 2011
VARGHESE GEORGE J
31 DECEMBER 2012

Contract — Specific performance — Conditional contract — Whether non-fulfilment of condition rendered contract void under s 36(1) of the Contracts Act 1950 — Whether purchaser failed to show it was ready, willing and able to complete contract — Whether purchaser rebutted presumption in s 11(2) of the Specific Relief Act 1950 by conceding damages were adequate remedy if contract was breached or terminated — Whether purchaser disentitled itself from obtaining specific performance

The defendant had agreed to sell a large tract of its land planted with oil palm ('the land') to the plaintiff conditional upon the obtaining of approval to the transaction from the Estate Land Board ('the ELB approval'). Originally, a clause in the sale and purchase agreement ('SPA') between the parties allowed the plaintiff to terminate the SPA if the ELB approval was not secured by the defendant within four months of the SPA. However, that clause was mutually amended to allow the plaintiff to terminate even if the ELB approval had been obtained and, upon such termination, to have the deposit paid under the SPA to be refunded to it. The parties later entered into a supplemental agreement ('SA') allowing for the ELB approval to be obtained within three months of the date of the SA. Although the defendant had applied for the ELB approval it claimed it never received news regarding the matter from the relevant land authority. Hence, when the three months after the date of the SA lapsed and the ELB approval had still not come through, the defendant notified the plaintiff that the SPA was deemed void under s 36(1) of the Contracts Act 1950 for non-fulfilment of the condition. The plaintiff thereupon filed the instant action seeking specific performance of the SPA. The defendant resisted the application, inter alia, contending the plaintiff was never 'ready or willing' to complete the SPA and that even if the defendant had breached the contract, which it denied, the plaintiff had conceded that damages, rather than specific performance, would be adequate remedy. The defendant counterclaimed for a declaration that the SPA had been properly terminated and for an order that the plaintiff remove the private caveat it had entered on the land.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim:

(1) The defendant was contractually entitled, after the lapse of three months

from the date of the SA, to treat the SPA as being of no further effect. The defendant's notice to the plaintiff under s 36(1) of the Contracts Act was a legitimate one and could not be faulted. There was no breach of the contract by the defendant (see para 32).

(2) The plaintiff had not demonstrated that it was continuously ready, willing and able to complete the purchase of the land. The plaintiff had not shown that since the execution of the SPA down to the time of the filing of the action it had access to funds to complete the purchase. The plaintiff was unable to fulfill its side of the bargain and was therefore not entitled to an order for specific performance (see paras 54 & 66).

(3) The presumption in s 11(2) of the Specific Relief Act 1950 had been rebutted in that there was ample proof the plaintiff expressly or otherwise had conceded that damages would be adequate if a breach of contract was to be committed by the defendant and/or if the SPA was no longer in force or terminated. However, no evidence was placed before the Court of any loss occasioned to or likely to be incurred by the plaintiff. Under the counterclaim, the defendant also led no evidence to show it had suffered any loss or damage. Accordingly neither the plaintiff nor the defendant were entitled to any order for damages (see paras 63, 67–69).

[Bahasa Malaysia summary

Defendan telah bersetuju untuk menjual saluran besar di atas tanahnya yang ditanam dengan kelapa sawit ('tanah tersebut') kepada plaintif tertakluk kepada kelulusan untuk transaksi daripada Lembaga Tanah Ladang ('kelulusan LTL'). Pada asalnya, satu klausa dalam perjanjian jual beli ('PJB') antara pihak-pihak membenarkan plaintif untuk menamatkan PJB jika kelulusan LTL tidak dijamin oleh defendan dalam tempoh empat bulan PJB. Walau bagaimanapun, klausa tersebut saling dipinda bagi membolehkan plaintif menamatkan walaupun kelulusan LTL telah diperolehi dan, dengan penamatan tersebut, membayar deposit di bawah PJB untuk dikembalikan kepadanya. Pihak-pihak kemudiannya menandatangani perjanjian tambahan ('PT') bagi membenarkan kelulusan LTL akan diperolehi dalam tempoh tiga bulan dari tarikh PT. Walaupun defendan telah memohon kelulusan LTL, ia mendakwa tidak pernah menerima perkhabaran mengenai perkara tersebut daripada pihak berkuasa tanah yang berkaitan. Oleh itu, apabila tempoh tiga bulan selepas tarikh PT luput dan kelulusan LTL masih belum diperolehi, defendan-defendan memaklumkan plaintif bahawa PJB tersebut dianggap tidak sah di bawah s 36(1) Akta Kontrak 1950 kerana tidak memenuhi syarat. Plaintif dengan itu memfailkan tindakan ini memohon bagi pelaksanaan spesifik PJB. Defendan menolak permohonan tersebut, antara lain, menghujahkan bahawa plaintif tidak pernah 'bersedia atau sanggup' memeterai PJB dan bahawa walaupun defendan telah melanggar kontrak tersebut, yang mana ia nafikan, plaintif mengakui bahawa ganti rugi, dan bukannya pelaksanaan spesifik, adalah remedi yang memadai. Defendan

menuntut balas bagi suatu perisytiharan bahawa PJB telah ditamatkan dengan betul dan untuk mendapatkan suatu perintah bahawa plaintif membatalkan kaveat persendirian yang telah dimasukkan ke atas tanah tersebut.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Defendan berhak secara kontraktual, selepas luput tiga bulan dari tarikh PT, untuk menganggap PJB tersebut tidak mempunyai kesan lagi. Notis defendan kepada plaintif di bawah s 36(1) Akta Kontrak adalah sah dan tidak boleh disalahkan. Tiada pelanggaran kontrak berlaku oleh defendan (lihat perenggan 32).

(2) Plaintif tidak menunjukkan bahawa ia sentiasa bersedia, sanggup dan mampu untuk melengkapkan pembelian tanah. Plaintif tidak menunjukkan bahawa sejak pelaksanaan PJB hingga masa memfailkan tindakan, ia mempunyai akses kepada dana untuk melengkapkan pembelian. Plaintif tidak dapat memenuhi bahagiannya dan oleh itu tidak berhak untuk suatu perintah bagi pelaksanaan spesifik (lihat perenggan 54 & 66).

(3) Anggapan di bawah s 11(2) Akta Relief Spesifik 1950 telah dipatahkan di mana terdapat keterangan yang mencukupi bahawa plaintif secara nyata atau sebaliknya telah mengakui bahawa ganti rugi adalah memadai jika pelanggaran kontrak dilakukan oleh defendan dan/atau jika PJB tidak lagi berkuat kuasa atau ditamatkan. Walau bagaimanapun, tiada keterangan yang dikemukakan di hadapan mahkamah bagi membuktikan apa-apa kerugian yang disebabkan kepada atau mungkin dilakukan oleh plaintif. Dalam tuntutan balas tersebut, defendan juga tidak mengemukakan sebarang keterangan yang menunjukkan bahawa ia telah mengalami apa-apa kerugian atau ganti rugi. Oleh itu plaintif mahupun defendan tidak berhak ke atas apa-apa perintah ganti rugi (lihat perenggan 63, 67–69).]

Notes

For a case on conditional contract, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) para 5996.

Cases referred to

De Medina v Norman (1842) 9 M&W 820 (refd)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23, HC (refd)
Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24, SC (refd)
JP Builders v A Ramadas Rao (2011) 1 SCC 429, SC (refd)
NP Thirugnanam v Dr R Jagan Mohan Rao & Ors AIR 1996 SC 116, SC (refd)

Legislation referred to

Contracts Act 1950 ss 36(1), (2), 52, 53, 54, 55, 56, 57, 58, 59
National Land Code s 214A, Form 14D
Specific Relief Act 1950 ss 11, 11(2), 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34(1), (a), 37
Specific Relief Act 1963 [IND] s 16(c)

Tan Kah Hoo (Gan Taik Chee & Ho) for the plaintiff.
YC Wong (YC Wong) for the defendant.

Varghese George J:

INTRODUCTION/BACKGROUND FACTS

[1] The plaintiff in this suit sought for an order for specific performance to be issued against the defendant in respect of a sale and purchase agreement dated 13 December 2007 ('SPA') and a supplemental agreement dated 16 August 2010 ('supplemental agreement').

The defendant resisted the said application and further by way of a counterclaim prayed, inter alia, for the SPA to be declared as terminated and of no further effect. It was also the defendant's contention that the plaintiff was never 'ready' or 'willing' to perform the contract evidenced by the SPA and the supplemental agreement.

[2] The dispute between the parties was essentially over a piece of land measuring in area approximately 116.95 hectares planted with oil palm and held under Geran No 36568, for Lot 2884 Mukim Kupang, Daerah Baling, Kedah ('the said property').

[3] The defendant was the registered owner of the said property and the vendor in the sale and purchase transaction.

The plaintiff was the intended purchaser of the said property.

[4] As the size of the said property was in excess of 40 hectares in area, it was deemed to be an 'estate-land' under s 214A of the National Land Code ('NLC') and subject to the legal constraints imposed by that provision of the law.

The sale and purchase transaction was therefore drawn up conditional upon the approval of the estate land board ('ELB approval') being secured for the transaction to be completed.

Originally it was a term of the SPA, that the ELB approval was to be obtained within four months of the SPA (termed as the 'Application Time' — cl 4(c)).

Clause 4(d) of the SPA also provided that if the 'ELB approval' was rejected by the relevant authorities then the SPA would be deemed to be aborted. Clause 4(e) in its original terms allowed to the plaintiff an option to await the ELB approval or to terminate the SPA if the ELB approval was not obtained within the 'Application Time'.

[5] The agreed and declared sale consideration in the SPA was RM12,648,000. The plaintiff had paid 10% of the purchase consideration prior to the execution of the SPA and this sum, which constituted the deposit of RM1,264,800, was retained by a mutually agreed stakeholder pending the outcome of the process to obtain the requisite ELB approval.

[6] As was required by the law, an application for ELB approval was submitted and the relevant Form 14D was jointly signed by the plaintiff and the defendant. The SPA had provided that the defendant was to do all acts and furnish all information and documents that were necessary for purposes of the ELB approval and upon receipt of such approval, the defendant's solicitors were to confirm the same in writing. Within four months of any such written confirmation, the plaintiff had to pay the balance of purchase price (with an extension of one further month with payment of agreed interest for the extended period) to complete the sale and purchase transaction.

[7] It need to be registered here that in January 2009, the plaintiff initiated moves to amend cl 4(e) of the SPA and an agreement was reached between the parties thereto on 21 January 2009 by exchange of correspondence; this amendment allowed for the plaintiff to terminate the SPA even if the ELB approval had been secured. (Original and amended cl 4(e) discussed anon).

[8] Subsequently, the parties then entered into the supplemental agreement which was dated 16 August 2010, and a material term thereto was as follows:

> 4. The Application Time pursuant to Clause 4(c) of the SPA shall be amended to three (3) months from the date of this supplemental agreement.

[9] Upon the expiry of the three month period from the date of the supplemental agreement and on the premise that no ELB approval was in hand (discussed anon) by then, the defendant through solicitors on 3 December 2010 issued a notice in writing invoking s 36(1) of the Contracts Act 1950 to deem the SPA as void and of no further effect. Section 36(1) provided as follows:

> 36 (1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event had not happened, or if, before the time fixed, the event becomes impossible.

[10] This suit by the plaintiff (filed on 26 April 2011) was triggered or precipitated by the aforesaid defendant's notice of 3 December 2010.

ELB approval

[11] As it however transpired the plaintiff had written to the relevant land authorities (after this suit was filed) to enquire as to the status of the application for ELB approval. PW1, the Penolong Pengarah Tanah dan Galian (Bahagian Hasil dan Khidmat Pengurusan), Kedah, who was called as a witness by the plaintiff testified that the records at the relevant land authority showed that the ELB approval had been granted on 28 September 2008 in respect of this case and solicitors for the defendant had been notified of this development by letter. Further a certificate to that effect had also apparently been forwarded to the defendant's solicitors on 13 October 2008. PW1 however also testified that there was no record of those letters being actually sent out to the defendant's solicitors.

[12] The solicitors for the defendant however denied ever receiving that notification and referred to the address to which it was apparently sent to by the land authorities. On the face of it, that address was no longer that of the defendant's solicitor's office address at that material time (September/October 2008).

[13] The plaintiff on their part also denied that they ever had any knowledge either, as to the fact that the ELB approval had been issued in September/October 2008 by the relevant authorities.

The plaintiff's case

[14] The plaintiff contended that the abovementioned letter from the state land office (Pengarah Tanah dan Galian) had in all likelihood been delivered to the defendant's solicitors and that the defendant together with the defendant's solicitors had deliberately suppressed the fact of the receipt of the ELB approval.

It was suggested that the motive behind this was to allow the defendant to exit the SPA considering, as it was alleged, that market value of planted/fruiting oil palm plantation was on the rise during that period.

[15] It was also the plaintiff's contention that they were not obliged to take any steps to complete the sale and purchase transaction until the plaintiff or their solicitors were notified in writing by the defendant's solicitors of the receipt of the ELB approval. The plaintiff's argument was that such

'notification in writing' constituted a 'reciprocal promise' as envisaged by s 53 of the Contract Act 1956 and/or s 55 of the Contract Act 1956, which had to be first fulfilled by the defendant.

It was submitted that it was the default of the defendant that had delayed the completion of the sale and purchase agreement and now with the ELB approval in place, the plaintiff was entitled to specific performance of the transaction in respect of the said property.

The defendant's case

[16] The defendant on the other hand asserted that it had been open to the plaintiff at all times to directly make enquiries with the relevant authorities as to the status of the application for the ELB approval and the reasonable inference from, in particular, the following intervening events could only be that the plaintiff had knowledge that the ELB approval had been issued by authorities. They were that:

(a) it was the plaintiff who initiated amendments to cl 4(e) of the SPA in January 2009, the effect of which amendments was to allow the plaintiff to terminate the SPA even if the ELB approval had been obtained; and

(b) the plaintiff had entered into negotiations in May 2010 or thereabouts, through the legal firm of Messrs Balabedha and Company, with a third party for the plaintiff's shareholders to divest of their shareholdings in the plaintiff company thereby intending to devolve upon the new shareholders the benefit of the SPA (that is, with the ELB approval in place).

[17] It was also the defendant's suggestion that the plaintiff's ultimate intention behind entering into the contract was not to purchase the said property for themselves but to arrange for and enter into a 'sub-sale' of the said property to some other, with the motive of deriving a profit thereby to the plaintiff. The plaintiff's subsequent conduct, it was submitted was to make sure that, in the least, the plaintiff did not lose the 'deposit' sum paid by them.

It was further argued that the plaintiff did not have the capacity to nor was the plaintiff continuously ready or willing to complete the sale and purchase transaction.

[18] Although various issues and contentions were raised in the pleaded defence and counterclaim, the defendant at submission stage, limited their defence and also the basis for the defendant's counterclaim, to the following grounds:

(a) the plaintiff had failed to prove readiness and willingness to perform the contract, a prerequisite to be satisfied if specific performance was to be ordered;

(b) the terms of the contract by itself or as varied gave the plaintiff an unfair advantage over the defendant in respect of the transaction;

(c) the conduct of the plaintiff in the course of the transaction disentitled the plaintiff to an order for specific performance, in any event; and

(d) even if there was a breach of contract on the part of the defendant (denied), the presumption under s 11(2) of the Specific Relief Act 1950 (that any breach of contract to transfers immovable property could not be adequately relieved by monetary compensation/damages) had been rebutted in this case; damages would be an adequate relief.

It was urged upon the court, that since specific performance was a discretionary remedy, on the particular circumstances surrounding this case, the plaintiff was not entitled to that relief.

CHRONOLOGY OF EVENTS

[19] To recap, the sequence of material events as emerged was as follows:

(a)	13 December 2007:	SPA was entered into by the parties
(b)	2 January 2009:	The plaintiff's solicitors letter initiating/proposing amendment to cl 4(e) of the SPA.
	21 January 2009:	Agreement reached as to the amendment to cl 4(e) of the SPA.
(c)	6 July 2009:	Supplemental agreement put forward by the defendant's solicitors to confirm:-
		(i) net area of land involved in the transaction (after deduction of the acquired area; and
		(ii) consequently adjusted purchase consideration.
		(iii) the deadline for the securing of the ELB approval to be reset at four months after the date of the supplemental agreement.
	2 June 2010:	Supplemental agreement executed and returned by the plaintiff.
	16 August 2010:	Supplemental agreement dated and stamped.
	3 December 2010:	The defendant's solicitors letter to plaintiff invoking s 36 (1) of the Contracts Act 1950 to deem the SPA and/or the contract with the plaintiff as void and of no further effect.
(e)	26 April 2011:	The plaintiff filed this suit for specific performance of the SPA.
(f)	5 July 2011:	The plaintiff's solicitor's letter to Pejabat Pengarah Tanah dan Galian, Negeri Kedah enquiring as the status of the application for ELB approval.

14 July 2011:	Reply letter from Pejabat Pengarah Tanah dan Galian Negeri Kedah to the plaintiff's solicitors informing that the ELB approval had been granted on 28 September 2008 and a certificate thereto issued and forwarded to the defendant's solicitors on 13 October 2008.

ISSUES FOR DETERMINATION

[20] The issues for determination in this action could be summarised as follows:

(a) what were the operative contractual terms between the parties in respect of the disposition and acquisition of the said property;

(b) what was the effect of the amended cl 4(e) of the SPA;

(c) was the notification of the ELB approval actually received by the defendant's solicitors in late 2008, as alleged by the plaintiff;

(d) was 'notification of ELB approval' to be given by the defendant or their solicitors, a 'reciprocal promise' within the meaning of s 53 of the Contracts Act 1950 or s 55 of the Contracts Act 1950 and in the light of the amended cl 4(e), was such 'notification of ELB approval' any longer a material term of the contract;

(e) whether it had been established on evidence that the plaintiff was continuously ready and willing to perform the contract and/or carry out their obligation under the contract; and

(f) if there was a breach of contract by the defendant, whether the presumption provided by s 11(2) of the Specific Relief Act 1950 had been sufficiently and effectively rebutted to allow for compensation in monetary terms to be ordered, in lieu of an order for specific performance.

COURT'S EVALUATION

The contractual terms binding on the parties

[21] To recall, by the time of the institution of this action, the terms and conditions set out in the SPA had been varied by further agreement of the parties, and the operative terms of the contract between the parties in respect of the contemplated sale and purchase of the said property were evidenced in the following:

(a) the provisions of the SPA dated 13 December 2007;

(b) the amended cl 4(e); and

(c) the provisions of the supplemental agreement dated 16 August 2010.

By cl 34 of the SPA it was provided that all amendments and variations would be read and construed as incorporated into and formed part of the SPA at time of its execution.

[22] The plaintiff's case was principally premised on a contention that the securing of the ELB approval was an act or a promise to be performed by the defendant. It was argued that this was the effect to be accorded if cl 4(a)–(b), together with s 3(b) of the Second Schedule of the SPA were construed together. This effect was repeatedly harped upon in counsel's submission which went on then to state that the plaintiff was not called upon to meet the plaintiff's obligations under the SPA unless that so called act or promise was first fulfilled by the defendant. The plaintiff's counsel termed this as a 'reciprocal promise' and contended that this had not been performed by the defendant.

[23] I considered this to be a wholly misconceived if not a misleading and fallacious line of contention. Such a contention ignored a very significant distinction that existed between a 'promissory condition' and a 'contingent condition'. (The distinction to be drawn as between a promissory condition and a contingent condition is further discussed (anon) when the plaintiffs contention of a 'reciprocal promise' in the context of ss 53 and s 55 of the Contracts Act 1950 is dealt with in further detail.)

[24] Whether the ELB approval was granted or rejected was not within the control or a doing expected of the defendant and was therefore not an act or promise to be performed by the defendant. It was an anticipated act of an independent body, and amounted to an uncertain event (and definitely not one within the control of both parties). The further progress, if at all, of the sale and purchase transaction was by agreement dependent on the contingent event, namely the ELB approval being issued by the third party.

The role of the defendant was merely to administratively coordinate and pursue the same. That was the plain and undisputable meaning and clear intention behind the words employed in those clauses. The 'written confirmation' to be issued by the defendant's solicitors if the ELB approval was obtained (s 3(b) of the Second Schedule) was only a consequential act envisaged in that administrative process when that anticipated event happened.

It must be stressed here that the scenario here was unlike a situation where a vendor of an immovable property was under an obligation, say:

(a) to settle on his own any outstanding borrowing taken on the land as security and have the property first unencumbered; or

(b) to evict all occupants or squatters on the property in question and confirm vacant possession

before the transaction was proceeded with further. Such as above were examples of 'promissory condition'.

[25] The attempt to read into the plain words of those clauses and equate matters stated there as imposing an 'act' or 'promise' to be performed by the defendant, was therefore in my judgment untenable and a superficial one at that. The responsibility attributed to the defendant in the SPA pertaining to the process of securing the ELB approval did not, in my assessment on a closer reading of the relevant clauses, amount to a 'reciprocal promise' as understood in law.

This basic premise on which the plaintiff's submissions/case was built upon had therefore to be rejected at outset.

Clause 4(e) as amended

[26] As regards, the amended cl 4(e), it need to be firstly, emphasised that it was the plaintiff who initiated the amendment in January 2009. Viewed against the chronology of events set out above, it would be observed that this was just about the time or subsequent to when the ELB approval had been granted (as now evident), that is, September/October 2008 (supposedly unknown as claimed by both the plaintiff and defendant).

The original cl 4(e) was in the following terms:

> *In the event the Board's Approval is not obtained by* the Application Time despite the best endeavour of the Vendor, then the *purchaser shall* at any time thereafter *have the option whether to further await the said Approval or to terminate this Agreement*. If the purchaser shall exercise the option to terminate this Agreement the Vendor shall within seven (7) days from the termination refund to the purchaser the Deposit Sum together with the interest incurred thereon from the fixed deposit account as mentioned in Clause 1 (b) hereof and the purchaser or his solicitors shall return all documents (if any) executed by the Vendor to the Vendor's solicitors for cancellation and thereafter no parties shall have any claim against each other.

The amended cl 4(e) was as follows:

> 4(e) In the event that the Board's Approval is not obtained by the Application Time despite the best endeavour of the Vendor, then the purchaser shall at any time thereafter prior to the completion of this Agreement (*whether the said Approval shall have subsequently obtained or not*) have the option whether to terminate this Agreement. If the purchaser shall exercise the option to terminate this agreement the Vendor shall within seven (7) days from the termination refund to the purchaser the Deposit sum together with the interest incurred thereon from the fixed deposit account as mentioned in Clause 1 (b) hereof and the purchaser or his solicitors shall

return all documents (if any) executed by the Vendor to the Vendor's solicitors for cancellation and thereafter no parties shall have any claim against each other. (Emphasis added.)

[27] It was patently discernable from the amended cl 4(e), that the plaintiff could now as a matter of option which was open to the plaintiff only, decide unilaterally to terminate the SPA in any event, and seek a refund of the deposit sum paid, notwithstanding that the ELB approval had been secured to proceed and complete the sale and purchase of the said property.

The provision of the amended cl 4(e) was therefore a material departure from the originally concluded terms between the parties despite this amendment being agreed to by the defendant. In my assessment, the defendant was definitely placed in a seriously disadvantaged position and the terms to complete the bargain between the parties had now become stacked unfairly against the defendant.

[28] There was no denying the fact that the situation that now obtained in the matter, provided on the one hand, an option for the plaintiff to walk out of the deal (even if the condition precedent was satisfied) without forfeiture of the deposit sum, while on the other hand, the defendant was to remain still obligated to dispose of the property to the plaintiff at the agreed consideration, that too, without any definite time period for such option to be exercised or for the deal to be proceeded with.

Supplemental agreement

[29] Part of the area comprised in the said property had been acquired by the authorities prior to the execution of the SPA. This had been recognised and disclosed in cl 20 of the SPA. The necessity which lay principally behind the supplemental agreement, as it appeared, was to confirm the net area of land involved in the transaction and the resultant adjustment to the agreed purchase consideration.

Apart from that, the terms of the supplemental agreement bore out the fact that the parties had further agreed to reset the deadline for obtaining the ELB approval at three months after the date of the supplemental agreement.

[30] The evidence before me was that there had been a delay of almost nine months on the part of the plaintiff (from 6 July 2009–2 June 2010) in executing and returning the supplemental agreement to the defendant. It was also noteworthy that at about the time of the delayed execution of the supplemental agreement, the plaintiff and/or the plaintiff's shareholders was in the midst of negotiations for the sale of said property (for a higher consideration and profit) or of the shares in plaintiff to effectually devolve the

benefit of the SPA to a third party (Lechmi Rubber and Oil Plantation Sdn Bhd) represented by Messrs Balabedha & Co (see D8 and D10 admitted at trial).

The reasonable inference that one could draw from those facts was that the plaintiff had intentionally delayed the execution of the supplemental agreement until some likelihood of completing a 'sub-sale' of the said property took shape. In the end, the deal with the third party did not materialise and the deadline for the SPA to remain in force remained at three months after the date of the supplemental agreement. This was binding on both parties.

[31] To me, the further delay of two months by the defendant's solicitors in dating and stamping the supplemental agreement after it was returned (in June 2010) was in any case, more favourable to the plaintiff as the cut-off date for the validity of the SPA had been thereby further extended; this delay did not result in any advantage to the defendant. There was no valid cause for any complaint of the plaintiff on account of that delay.

[32] Without a doubt therefore, the defendant was contractually entitled to, after the lapse of three months from the date of the supplemental agreement, to treat the SPA as being of no further effect. The notice pursuant to s 36(1) of the Contracts Act 1950 issued by the defendant's solicitors was in my finding, a legitimate one and could not be faulted in the circumstances. There was in the circumstances no breach of the contract bv the defendant, as alleged by the plaintiff.

In *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24, the Supreme Court per Mohamed Azmi SCJ (in somewhat similar circumstances where an approval from state authorities was required for a sale and purchase transaction to go through) instructively observed as follows:

> In our judgment this was a case where time was not merely of the essence of the contract but fulfillment of the promise by the appellant to obtain the approval on or before December 31, 1997 was a condition precedent of the whole contract. As such s 56 of the Contracts Act did not apply and the proper provision should be s 36(1) which provides:
>
> > In the present appeal the uncertain event was the approval of subdivision by the state authority. The respondent promised to transfer her half-share in the land to the appellant if the approval was obtained within two years of the agreement. The event had not happened by the deadline and therefore under s 36(1) the contract became void. The dismissal of the appellant's claim for specific performance was correct in law.

(This decision was subsequently affirmed by the Privy Council on appeal (1987) 4 PCC 707. See p 134 Sinnadurai, *Law of Contract*, (4th Ed), Vol 1).

Was the notification from the relevant land office as to grant of the ELB approval received by the defendant's solicitors in late 2008, as alleged by the plaintiff

[33] As noted earlier, the plaintiff's argument was that in all likelihood the PTG's notification had been delivered to or received by the defendant's solicitors and the latter had chosen to suppress the same to enable the defendant to exit the SPA. It was suggested too that the trend of market value of planted/fruiting oil palm plantation was on the rise during that time.

I did not find that suggestion of the plaintiff to be grounded on facts. The lapse of time between the date of SPA (13 December 2007) and the ELB approval (as it transpired, on 28 September 2008) was merely ten months and there could not have been such a drastic upward increase in price or of demand for such plantation land in that locality during that short period. In any event the plaintiff had not produced any evidence of price movement of oil palm land (concluded sales) to lend credence to that suggestion, even remotely, and therefore it had to be treated as a bare assertion.

[34] It was also in evidence, that in response to enquiries from the plaintiff or plaintiff's solicitors, the defendant had though their solicitors, on two occasions forwarded to the plaintiff's solicitors their correspondence with the relevant land office on the subject of the application for ELB approval and even in their letter of 3 December 2010 to the plaintiffs solicitors the defendant had maintained that they had yet to be informed of the outcome of the application.

It was to be borne in mind, that firstly, the records in the land office were easily available and always open even to the plaintiff to ascertain the current status (as a joint signatory to the application) of the application for ELB approval, then pending.

Secondly, since records in the land office were easily verifiable should there be a subsequent challenge, it was not likely, in my assessment, that the defendant's solicitors would have chosen to be so brazen to mislead or suppress any such development from the plaintiff.

[35] Thirdly, and most significantly, I had occasion to observe and analyse the respective testimonies of the plaintiff's solicitor handling the matter ('PW3') and the defendant's solicitor having conduct of the matter ('DW2'). The explanation of DW2 as to how the letter or letters from the relevant land office was likely not to have been delivered (due to a change of address of the defendant's solicitor's firm) was a plausible reason why the particular subject correspondence was not received and I saw no reason to reject that explanation outright, as urged for the plaintiff. Furthermore, it merits repetition here, that there was no or any concrete evidence that those letters from the land authorities had in fact been dispatched at all (PWT's testimony).

I was satisfied that DW2 was not misleading or being untruthful to the court

when he testified that the defendant's solicitors were not aware at all of the existence of the ELB approval which had apparently been issued in late 2008.

[36] On the evidence led before me, I was therefore satisfied that the defendant's solicitors had not received the notification of the ELB approval or were made aware of it on or about the time it apparently was granted by the relevant authorities, that is on or about September or October 2008.

[37] I must also observe here that the plaintiff could have always taken steps on their own to expedite the ELB approval if they truly intended to complete the transaction. It was in the plaintiff's interest to be proactive but their obvious silence or inaction (until after this suit was filed), in my assessment betrayed their ultimate objective, as it would appear, namely, to hive off the said property to some other for a profit.

[38] In the final analysis, now with the amended cl 4(e) of the SPA as earlier highlighted, it was no longer of any consequence whether the ELB approval was secured or not; even if such ELB approval was in hand, the plaintiff had worked out an avenue to walk out of the deal entered into with the defendant, and that too with the deposit sum fully refunded to the plaintiff.

The plaintiff's contention that notification of elb approval was a 'reciprocal promise'

[39] It was the plaintiff's contention that they were not obliged to take any steps under the SPA until they or their solicitors were notified in writing by the defendant or defendant's solicitors that ELB approval for the transaction to go though had been obtained. The plaintiff's contention was that such 'notification' constituted a 'reciprocal promise' envisaged under s 53 or 55 of the Contracts Act 1950 and this had not happened yet.

I could not agree with that contention of the plaintiff.

[40] Sections 53 and 55 of the Contracts Act 1950 are reproduced here (together with the Illustrations provided with those provisions):

> 53 Where the order in which, reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.
>
> ILLUSTRATIONS
>
> (a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.
>
> (b) A and B contract that A shall make over his stock-in-trade to B at a fixed

price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

55 When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.

ILLUSTRATIONS

(a) A hires B's ship to take in and convey, from Kelang to Singapore, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B;s promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contract with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise, within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promise B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

Sections 52–59 came under that part of the Contracts Act 1950 with the given heading-Performance of Reciprocal Promises.

The purport and intent behind those provisions are obvious and plainly evident from the respective Illustrations given in those sections. It is beyond any doubt that those provisions would come to apply only where the reciprocal acts or promises in question were within the powers or control of the promisor, independently and separately, to perform. The grant or rejection of the ELB was not within the authority, control or in the nature of a 'doing' contemplated to be done by the defendant.

[41] As discussed earlier above, the grant of the ELB approval was wholly within the purview and in the hands of the relevant land authority (a separate entity), and not a contemplated act or promise of the defendant The ELB approval was a contingent condition for the completion of the transaction and

the forwarding of a written confirmation by defendant's solicitors that it had been issued by the authorities concerned, was merely a corollary administrative step in that process.

In *Jaafar bin Ibrahim*'s case, supra the Supreme Court also observed as follows:

> Further, a *distinction should be made between 'promissory' condition and 'contingent' condition* — the former being a promise or assurance for the non-performance of which a right of action accrues to the innocent party, and in the latter case the non-fulfillment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties (see *Chitty on Contracts*, (25th Ed), p 751, para 752).

[42] In this case, the application for the ELB had been duly submitted by or for the defendant. The defendant's obligation was only to follow up with such an application which on evidence had also been shown to have been done. The obtaining of the ELB approval in this instant case was most certainly *not a 'promissory condition' (to be performed bv the defendant) but one of the latter kind-a 'contingent condition'*, dependent upon a 'specified uncertain event', to use the language of s 36(2) of the Contracts Act 1950.

In any case, the defendant or theirs solicitors was in no position to issue such confirmation (in writing) as it was their case, which I believed for the reasons stated earlier, that they had not received any intimation that the ELB approval had been granted.

[43] Now that upon the plaintiff's own enquiry, the plaintiff had been apprised that the ELB approval had been issued, further insistence that a 'notification in writing' (as coined by the plaintiff's counsel in his submission) had still to be issued by the defendant, in my view, was merely a red herring and an excuse to avoid the plaintiffs obligations to complete the envisaged transaction.

The critical question in the matter boiled down then to whether the plaintiff had the capacity, and had shown continuous readiness and willingness to perform the contract on the plaintiff's part as discussed hereafter.

The plaintiff's readiness and willingness to perform the contract

[44] It was trite that an order for specific performance or enforcement of a contract was a discretionary remedy that lay with the court to issue in appropriate situations and subject in any event to ss 11– 29 of the Specific Relief Act 1950. The antecedents of such a remedy were in equity and any relief to be allowed was to be based on equitable considerations, including the conduct of the party seeking such a relief prior and subsequent to the filing of the action.

[45] The principle of law that was to be applied in such a case was clarified and stated by the Federal Court in the landmark judgment in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 and included there were the following statement:

> Now, in a suit for specific performance, a party treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit …
>
> Although, so far as the Act (Indian Specific Relief Act 1877 which is in pari materia with our Specific Relief Act 1950) is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (s 24(b) and our s 23(b) is the nearest) it seems invariably to have been recognised, and on principle, Their Lordships think rightly, that the Indian and the English requirements in the matter are the same … This principle has been consistently adopted and applied by the courts in this country.

(The requirement that it be pleaded and readiness and willingness to perform had to be proved has since been codified in s 16(c) of the Indian Specific Relief Act 1963.)

[46] In *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23, Edgar Joseph Jr J (as His Lordship then was) commented on this principle and on the requirements or level of proof to be adduced by the person requiring specific performance, in the following words:

> The next point for consideration is whether the plaintiff was ready to complete at the material time.
>
> In relation to a purchaser, readiness to complete would consist of his having access to funds. I accept that a purchaser would not fail that test by reason of the fact that he was depending on a loan to be advanced on the security of property bought at least *provided the lender was ready to advance and the security documentation was ready and executed in escrow*.
>
> Counsel for the plaintiff had endeavoured to demonstrate that the plaintiff was ready, able and willing to complete. It was pointed out that the plaintiff had, at the material time, post-dated cheques to the tune of $1m in the custody of the third defendant and that a representative of a finance company (PW2) had stated that those cheques were negotiable. It was further pointed out by counsel that the plaintiff's family had a prosperous business in Thailand and that his wife held a piece of land as trustee in which she had a minor share.
>
> In my opinion, *the evidence relied on by counsel to demonstrate that the plaintiff had access to sufficient funds to complete was less than slender*. For example, the evidence of PW2 was at best purely speculative since no application for a loan had in fact been

A made to the finance company which he represented. No proof was furnished as to any security which the plaintiff could have furnished in support of an application for a loan. As for the plaintiff's testimony that his family had a prosperous business in Thailand, I need no more than say that this was evidence of a very general character and wholly unconvincing. Similarly, the claim that his wife held land as trustee in which she had a minor share as beneficiary suffers from the same defect. Moreover, no proof was furnished as to the value of the wife's interest and whether it was marketable and even if so, perhaps, an application for leave to sell would have been necessary which might not necessarily have been granted. There was also evidence which emerged during the cross-examination of the plaintiff by counsel for the third defendant that the plaintiff had applied for a loan to the third defendant but that this had been turned down.

In this context, it is pertinent to refer to more general considerations such as the conveyancing practice of appointing stakeholders …

The plaintiff did not, however, appoint a stakeholder and leave with him the balance of the purchase price. Indeed, in answer to a query from me, his counsel confirmed that *even UP to the hearing the plaintiff had not deposited the balance of the purchase price* with anyone or paid it into court.

Accordingly, I am satisfied that the plaintiff was not able to discharge his financial obligation under the contract of sale … (Emphasis added.)

[47] The words 'ready and willing' implied not merely a disposition but the capacity or ability to do the act (*De Medina v Norman* (1842) 9 M&W 820).

In *JP Builders v A Ramadas Rao* (2011) 1 SCC 429, the Indian Supreme Court held:

> The words 'ready' and 'willing' imply that the person was prepared to carry out the terms of the contract. The distinction between 'readiness' and willingness' is that *the former refers to financial capacity and the latter to theconduct of the plaintiff wanting performance*. Generally, readiness is backed by willingness … (Emphasis added.)

[48] In *JP Builders*, the Indian Supreme Court adopted and restated the principle laid down by the same apex court in *NP Thirugnanam v Dr R Jagan Mohan Rao & Ors* AIR 1996 SC 116 in the following words:

> … To adjudge whether the plaintiff is ready and willing to perform his part of the contract, *the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to oav to the defendant must of necessity be proved to be available*. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. (Emphasis added.)

[49] With those principles clear and well settled in the background, it was counsel for the defendant's submission that the plaintiff had not proved that the plaintiff was continuously 'ready and willing' to perform the plaintiff's part of the contract. Counsel went on to highlight the evidence before the court that clearly showed that the plaintiff did not have the capacity or was 'ready' and 'willing' to complete the contract in the SPA.

A

B

They included the following:

(a) the plaintiff's shareholders capital was a mere RM2 only and records filed with relevant authorities showed that the plaintiff was in the red; in other words it had accumulated losses;

C

(b) there was no evidence adduced as to the plaintiff's current financial standing or that during the period after execution of the SPA, the plaintiff had secured a commitment for banking facilities to complete the envisaged purchase subject to the obtaining of the ELB approval;

D

(c) to the contrary, the evidence was that the shareholders of the plaintiff had attempted to hive of the plaintiff's rights under the SPA (negotiations through Messrs Balabedha & Company referred) by a disposal of their shares in the plaintiff, but even here the directors of the plaintiff was reluctant to give any personal bank guarantees to complete that sub-sale deal;

E

(d) the plaintiffs had been dilatory in pursuing to enforce their rights under the SPA in any event (PW3 in cross-examination admitted that plaintiff did not seek or follow-up with the defendant's solicitors for updates on the application for ELB approval for seven months (13 December 2007–10 July 2008));

F

(e) in January 2009 the plaintiff initiated amendments to cl 4(e) of the SPA which secured for the plaintiff the option not to proceed with the envisaged transaction even if the ELB approval was secured;

G

(f) the plaintiff then took another nine months to execute and return the supplemental agreement (where apart from the adjusted land area and purchase consideration confirmed the parties reset a four month deadline to obtain the ELB approval; and

H

(g) even if a loan was secured (according to plaintiff, perhaps in the region of about RM10m) there was no evidence that the plaintiff had cash available to meet the differential sum (RM1m or so) to pay the full balance of purchase price (RM11.3m).

I

[50] I found that there were merits in the above submissions of the counsel for the defendant. The facts or inference from facts urged to be drawn by the court were adequately supported and borne out in the material, both oral and documentary, that was before me during the trial of the case.

[51] The defendant however attempted to refute the above submissions on two grounds, namely;

(a) that the plaintiff had paid a 10% deposit and allegedly that was sufficient indicator of their capacity to carry through with the sale and purchase transaction; and

(b) that the plaintiff had made enquiries and had obtained some response from two financial institutions as regards availability of financing in respect of the intended transaction.

[52] I was not persuaded that either or both of the grounds put forward by the plaintiff was relevant or sufficient in the circumstances to discharge the burden on the plaintiff to establish that they were continuously ready and willing to complete the bargain. Firstly, the enquiries with the financial institutions (OCBC, RHB Islamic) and their feedback, it will be observed, were all prior to execution of the SPA. There was no evidence that this was followed up and some commitment in more definite terms had been secured from those or any other financial institution as to the funding necessary to settle the balance of the purchase price when due.

Secondly, the fact that a deposit of 10% had previously been paid upon the execution of the SPA (December 2007), was not by any stretch of argument, proof that the plaintiff had the financial capacity or was possessed of necessary funds or even any promise of funds currently, to complete the purchase transaction by settlement of the balance of purchase price of RM11.3m.

I need no more than say, that such contention was totally unconvincing, if not cynical and bordering on the incredulous.

[53] Further and in my view most significantly, if at all the plaintiff was serious and was committed to complete the sale and purchase agreement as contracted for, it was open for the plaintiff to in the least adduce convincing evidence before the court, that subsequent to the discovery by the plaintiff that ELB approval was in place (that is, on 14 July 2011 —para 16 of the amended statement of claim) and by the date of the conclusion of the trial in this action, the plaintiff had managed to organise access to or had in hand sufficient funds/ banking facilities (together with any differential sum) to complete this transaction.

Alternatively, the plaintiff could have shown that by the time of the trial, a sub-sale had been concluded with some other party, that is, relying upon the enabling 'nominee' provision found in the SPA, and such intended nominated purchaser was in a position to proceed and complete the purchase.

There was no evidence forthcoming from the plaintiff to even suggest either of those developments, if at all.

[54] The plaintiff could not, in the circumstances, gain say that the plaintiff had demonstrated that they were continuously ready, willing and able to complete the contemplated purchase of the said property. The fact remained that the plaintiff was unable to fulfill their side of the bargain and was therefore not entitled to the order for specific performance prayed for.

Was there a breach by the defendant of the contract in the SPA

[55] The various issues discussed and elaborated upon above would have been sufficient to dismiss the plaintiff's action here. However it was the contention of the plaintiff that the defendant had breached the contract as between them by moving to terminate the SPA pursuant to s 36(2) of the Contracts Act 1950.

It was the plaintiff's further contention that pecuniary compensation was not an adequate relief and there ought to be an order for specific performance in any event since the alleged breach centered around the transfer of a piece of land.

[56] I had adverted to this earlier and held that the defendant's action pursuant to s 36(2) of the Contracts Act 1950 to terminate the contract was lawful considering that the deadline for the obtaining of the ELB approval or the validity of the SPA as reset in the supplemental agreement, had expired.

It must be repeated that it was my conclusion that there was no breach of contract by the defendant in the circumstances.

[57] Nevertheless should I be found to be in error on any of the conclusions reached, and further since rival submissions had been addressed to me by respective counsel on the question of whether pecuniary compensation would be adequate even assuming that there was a breach of contract by the defendant, I further dealt with that issue. Basically the question was whether the presumption set out in s 11(2) of the Specific Relief Act 1950 had or had not been rebutted.

Whether the presumption in s 11(2) of the Specific Relief Act has been sufficiently rebutted.

[58] Section 11 of the Specific Relief Act 1950 provided for the types of contracts where specific performance could be ordered. Section 11(2) provided as follows:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and the breach of a contract to transfer movable property can be thus relieved.

[59] It was counsel for defendant's submission that even if the court was minded to hold that the defendant had committed a breach of the contract, this presumption had been adequately rebutted. It was contended the court could and should in the circumstances only order monetary damages rather than grant the plaintiff the order for specific performance sought in this suit.

The plaintiff of course implored the court that an award of damages in monetary terms would not be adequate since, the subject in controversy was the plaintiffs loss was the right to a valuable piece of real property allegedly caused by the breach of the contract by the defendant.

[60] Counsel for the defendant drew the attention of the court to the plaintiffs solicitors' letter of 28 January 2011, which categorically stated that the plaintiff had 'obtained a purchaser to buy the subject property from our client (the plaintiff) at a profit' and also that 'Our client shall produce all the evidence in court and your client (the defendant) shall further be liable for the loss that they suffer'.

The plaintiffs solicitors' said letter was the one in response to the defendant's solicitors' letters of 3 December 2010 and 21 January 2011 which invoked s 36(2) of the Contracts Act 1950 and reiterated that stand respectively, that the SPA was deemed to be void as the agreed deadline for the ELB approval had passed.

[61] It was counsel for the defendant's submission that by the contents of that letter of 28 January 2011, the plaintiff had effectually limited in writing their remedy to a claim for loss of profit in monetary terms if the threatened 'breach of contract' was carried out by the defendant. I accepted that postulation as a reasonable conclusion to be drawn from the language of the letter in question. I also noted that although in an earlier part of the same letter the plaintiff solicitors had made a very general statement as to 'specific performance and/or damages' as recourses open to the plaintiff in the circumstances, the closing paragraph of the letter quoted above was more specific and explicitly represented that 'loss of profit' in monetary terms was indeed what the plaintiff would suffer.

[62] I also had for reference the amended cl 4(e) of the SPA which allowed the plaintiff to exit the contract with the defendant on the plaintiff's absolute volition, save and subject only to the 'deposit' sum paid by the plaintiff be refunded to the plaintiff (together with accrued interest thereon). The right to unilaterally terminate the SPA and be satisfied with a monetary repayment of the deposit clearly, in my view, affirmed that 'specific performance' of the contract was no longer of concern to the plaintiff and that the plaintiff would be satisfied with a settlement in monetarily terms.

[63] For those reasons, it was my conclusion that the presumption found in s 11(2) of the Specific relief Act 1950 had been rebutted in that there was ample proof that the plaintiff expressly or otherwise had conceded that monetary damages would be adequate, that is, if a 'breach of contract' was to be committed by the defendant (as threatened) and/or if the SPA was no longer in force or terminated.

CONCLUSION

[64] The burden of proving the case for an order for specific performance was always on the plaintiff. As discussed and deliberated above, the plaintiff had sorely failed to establish a right for such an order to be decreed by the court.

[65] It was also my conclusion that in the context of the critical issue that was before the court for determination, namely whether the plaintiff had proven a case for specific performance to be granted (issue of the plaintiff's capacity, continuous readiness and willingness to complete the purchase), it was not necessary for the defendant to call the two further earlier indentified witnesses, namely Mr Khaw Chiap Heng (chairman and major shareholder of defendant — company) and/or Mr Appalanaidu a/l Nookiah. There was no adverse inference to be drawn in the circumstances, from their failure to take the stand.

[66] On the totality of the evidence before the court, including that of the plaintiff's conduct (or rather passivity), during the intervening period from the execution of the SPA on 13 December 2007 (to the time of filing the action) as highlighted in this judgment and coupled to that, the failure of the plaintiff to satisfy the court that the plaintiff had access to funds to complete the sale and purchase transactions as originally contemplated, in my judgment, this was not a case where the courts discretion was to be exercised in favour of granting the plaintiff the order for specific performance.

DAMAGES

[67] Where an order for specific performance was refused, the court was empowered to consider whether compensation in monetary damages ought to be awarded in substitution for such order of specific performance. (Section 18 of the Specific Relief Act 1950) (the amended statement of claim — prayer (a)).

The plaintiff however had to show on evidence firstly, that the plaintiff had indeed suffered or was likely to suffer 'damages'. There was no such evidence placed before the court of any loss occasioned to or likely to be incurred by the plaintiff (save perhaps for the sum paid by plaintiff as deposit when the SPA was entered into). There was no evidence led to show that plaintiff had actually spent money in securing a bank loan or that the plaintiff had entered into a

sub-sale of the property to a nominee and had lost profit that could have been derived, despite an express claim to that effect in the plaintiff's solicitors' letter of 28 January 2011.

[68] In the counterclaim, the defendant had also prayed for 'damages' ostensibly arising from the alleged entry and continued detriment or loss caused by a caveat lodged by the plaintiff over the said property. defendant also prayed for such damages to be deducted from the 'deposit' to be refunded to the plaintiff, if such refund was ordered.

Here too, no evidence was led by the defendant to show how the defendant had suffered loss or damage from the entry of the caveat by the plaintiff.

[69] It was my conclusion therefore that both the plaintiff and the defendant were not entitled to any order for 'damages' or for an order for assessment of damages as prayed for in the pleadings.

The defendant's counterclaim, refund of the deposit sum

[70] The defendant's counterclaim was essentially for a declaration that the SPA had been terminated and for a caveat entered over the said property by the plaintiff be ordered to be cancelled.

The declaratory relief sought by the defendant was obviously in the context of s 34(1) of the Specific Relief Act 1950, the material part of which for our purposes here, was as follows:

> 34(1) Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:
>
> (a) where the contract is voidable or terminable by the plaintiff,
>
> (b) …
>
> (c) …

(In the context of a counterclaim the term 'plaintiff in s 34(1)(a) would apply to a defendant who also sought certain relief in the proceedings).

[71] As discussed above the amended cl 4(e) of the SPA allowed the defendant to put an end to the SPA should the ELB approval be not obtained within three months of 16 August 2010 (supplemental agreement). This was a term agreed by both parties to put a definite end to any further or lingering validity of the SPA. The defendant through their solicitors' letter 3 December 2010 had given notice to deem or treat the SPA as the terminated on the grounds that the 'condition precedent' was not in place or in hand by the stipulated binding deadline.

On the evidence and material led before the court, it was my conclusion that the defendant had made out a sufficient case why the orders sought in the counterclaim should be allowed.

[72] At s 37 of the Specific Relief Act 1950 it was further provided as follows:

> 37 On adjudging the rescission of a contract, the court may require the party to whom the relief is granted to make any compensation to the other which justice may require.

The deposit sum paid by the plaintiff (upon execution of the SPA) was being presently still held by a stakeholder or in a stakeholders account (for both parties) pending the outcome of the application for ELB approval. There was no disputing the intention behind this arrangement. The deposit sum was not to be considered to account of the agreed purchase consideration until such time as the ELB approval was in hand. In the event the SPA was not to be proceeded with, it was clear that the parties were agreed too that the deposit sum would be returned to the plaintiff (see as well the terms of the amended cl 4(e) to that effect too, if the plaintiff chose to terminate the SPA even with the ELB approval obtained).

[73] After having given due consideration to all relevant matters and factors, it was my decision that in this instant case, the fair, just and equitable order to be made in respect of the 'deposit sum' was have it refunded to the plaintiff. This was consistent to the underlying intention behind the SPA as commented above.

COSTS

[74] The defendant had only, after the close of a full trial with witnesses, that is, at the submission stage, chosen to abandon a major portion of the defendant's pleaded defences to the plaintiff's case. Much time of the plaintiff's counsel and of the court would have been saved if only the defendant had at the commencement of the trial narrowed down the issues. Unnecessary cross-examination and a protracted proceedings could have been avoided.

Although normally, costs will follow the outcome of the trial or cause, this suit, in the circumstances of what had transpired, was not one where, in my assessment, the losing party (the plaintiff) was to be ordered to bear and pay the costs of the defendant. The defendant had in the conduct of this case gone on a frolic of its own and the court should not be seen to allow the defendant to benefit from costs in the action when such conduct of the trial by the defendant was taken into consideration.

Hence, it was my conclusion that both parties ought to bear their own costs in this suit.

[75] In the result, the orders made by me in this action were:

(a) the plaintiff's claim in this action for an order against the defendant for specific performance of the sale and purchase agreement dated 13 December 2007 (SPA) (as varied and amended) be dismissed;

(b) that the deposit sum paid by the plaintiff under the terms of SPA of 13 December 2007 amounting to RM1,264,800 and retained by stakeholders for both parties, be refunded to the plaintiff together with all interest accrued thereon to date, within 21 days of the judgment;

(c) on the defendant's counterclaim, there be an order that the plaintiff cause to be forthwith withdrawn or cancelled any private caveat lodged by plaintiff over the whole of Lot 2084, held under *Geran* No 36568, Mukim Kupang, Daerah Baling, Negeri Kedah and the plaintiff be further restrained from entering any further caveat over the said land at any time; and

(d) the SPA of 13 December 2007 to hereafter have no further force or effect between the parties; and

(e) each party to bear their own costs.

Claim dismissed and counterclaim allowed.

Reported by Ashok Kumar